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In The

Supreme Court of the United States

FAIRBANKS NORTH STAR BOROUGH,

Petitioner,

v.

U.S. ARMY CORPS OF ENGINEERS,
JOHN W. PEABODY, AND KEVIN J. WILSON,

Respondents.

**On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit**

BRIEF OF THE STATE OF ALASKA AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*[1]

The State of Alaska has a keen interest in this case. It seeks to protect its traditional state authority to plan the development and use of its land and water resources, in the face of questionable assertions of authority from an often overbearing federal agency. *See* 33 U.S.C. § 1251(b). Alaska also has an interest as owner of over 100 million acres of land, granted by Congress at statehood to help the State finance its new government. *See* Alaska Statehood Act, § 6, Pub. L. No. 85-508, 72 Stat. 339 (1958). Over 43% of the land in Alaska, comprising some 174 million acres, is classified as wetlands by the federal government. U.S. Fish and Wildlife Service, *Status of Alaska Wetlands* 19 (1994), *available at* http://www.fws.gov/wetlands/_documents/gSandT/StateRegionalReports/StatusAlaskaWetlands.pdf. On Alaska's North Slope Coastal Plain, approximately 83% of the surface area is classified as wetlands. *Id.* at 20. This area is frozen most of the year and underlain by permafrost year-round. In addition, Alaska has innumerable other surface waters such as lakes and rivers. As this Court has acknowledged, more than half of the surface area of Alaska could potentially qualify as "waters of the United States" subject to federal regulation under the Clean Water Act. *Rapanos v. United States*, 547 U.S. 715, 722 (2006); *see also* U.S. Fish and Wildlife Service, *supra*, at 18.

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[1] The state notified the borough ten days prior to the due date of this brief of the intention to file. The state notified the attorney for the Corps on March 20, 2009.

Because of the prevalence of wetlands and other surface waters, many, if not most large-scale projects in Alaska disturb wetlands or surface waters. Virtually every significant public project in Alaska – whether for roads, airports, pipelines, sewers, electrical transmission lines, correctional facilities or courthouses – potentially impacts "waters of the United States," thus triggering a federal permitting process under the Clean Water Act.[2] That permitting process requires a significant investment of time and money. Seven years ago, the average applicant for an individual Section 404 permit spent $271,596 completing the permit process, not including costs of mitigation or design changes. *Rapanos,* 547 U.S. at 721 (citing Sunding & Zilberman, *The Economics of Environmental Regulation by Licensing: An Assessment of Recent Changes to the Wetland Permitting Process*, 42 Nat. Resources J. 59, 74-76 (2002)). Some applicants spent as much as $1,530,000, again exclusive of mitigation or design change costs. Sunding & Zilberman, *supra*, at 74 n.67. Large public projects in Alaska tend toward, and sometimes exceed, the high end of this scale.

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[2] "Over 90 percent of highway projects in Alaska affect protected resources (e.g., wetlands, anadromous fish streams, or essential fish habitat)." *Alaska Environmental Procedures Manual*, Alaska Department of Transportation and Public Facilities at 1-5 (2002), *available at* http://www.dot.state.ak.us/stwddes/dcsenviron/assets/pdf/manual/ch01.pdf.

Because so much of Alaska is potentially subject to the authority of the Army Corps of Engineers under the Clean Water Act, the State is concerned about the process by which the Corps' jurisdictional determinations are made and reviewed. The need for immediate court review of jurisdictional determinations is heightened by the legal uncertainty surrounding the scope of "waters of the United States" in the wake of *Rapanos*. As discussed in the argument section of this brief, to delay judicial review of the Corps' jurisdictional determination until the permitting process is complete may effectively deny the right to review, and certainly denies the opportunity for meaningful relief if the Corps wrongfully asserts jurisdiction. Timely judicial review of jurisdictional determinations is critical for Alaska and Alaskans because of the prevalence of potential wetlands in the state, the likelihood of controversial jurisdictional determinations, and the burdens of the permitting process. Alaska therefore urges the Court to hear this case and to ensure meaningful judicial review of the Corps' assertion of jurisdiction over the land in this state.

SUMMARY OF ARGUMENT

A jurisdictional determination by the Corps of Engineers is final agency action immediately reviewable by a court. The Ninth Circuit incorrectly held that the jurisdictional determination in this case did not meet the finality test of *Bennett v. Spear*, 520 U.S.

154 (1997), because in its view the decision was not an "action by which 'rights or obligations have been determined,' or from which 'legal consequences will flow.'" *See id.* at 178. While the Clean Water Act requires a Section 404 permit to discharge "dredged or fill" material into "waters of the United States," 33 U.S.C. § 1344, neither the statute nor the Corps' regulations clearly delineate what *lands* might be sufficiently saturated to fall within the scope of the statute. Only the Corps' jurisdictional determinations definitively impose the Clean Water Act's requirements on a landowner. Therefore, the agency's decision is what ultimately determines the obligations of the applicant.

Alternatively, if the Corps' jurisdictional determination is not final agency action, it should be immediately reviewable under the collateral order doctrine. The jurisdictional determination is the Corps' conclusive decision on the disputed question; it resolves an important issue separate from the merits of the action; and the applicant's interest are no longer capable of vindication after the costly and difficult Section 404 permitting process is complete.

ARGUMENT

I. THE CORPS' JURISDICTIONAL DECISION CONSTITUTES FINAL AGENCY ACTION BECAUSE THE CLEAN WATER ACT ALONE IS TOO VAGUE TO IMPOSE RECOGNIZABLE LEGAL OBLIGATIONS ON A LANDOWNER WHO WISHES TO DEVELOP PROPERTY.

The parcel of land that Fairbanks wishes to develop for recreation, with playgrounds, athletic fields, concession stands, and parking lots, does not contain anything recognizable as "waters of the United States." *See Fairbanks North Star Borough v. U.S. Army Corps of Engineers*, 543 F.3d 586, 589 (9th Cir. 2008). Fairbanks does not believe that the parcel contains "waters of the United States" requiring Section 404 permits because the land is not "periodically inundated," does not have "saturated soils during the growing season," and is "underlain by shallow permafrost at a depth of 20 inches" that does not "exceed zero degrees Celsius at any point during the calendar year." *Id.* at 590. But because the Corps interprets the Clean Water Act as broadly as possible, to extend to the full reach of the Commerce Clause, *see Rapanos*, 547 U.S. at 724 (citing 42 Fed. Reg. 37144 n.2 (1977)), Fairbanks prudently asked for a jurisdictional determination before beginning the project. *Fairbanks North Star Borough*, 543 F.3d at 589. Fairbanks asked the Corps to determine whether it could proceed with this project without permits, and asked that, if the parcel contained "waters of the

United States" subject to the Clean Water Act, the Corps provide a drawing depicting the "wetlands in relation to the lot boundaries." *Id.* In response, the Corps issued a jurisdictional determination finding that "the entire parcel . . . contains waters of the United States . . . under our regulatory jurisdiction." *Id.* The Corps' letter stated that under the Clean Water Act, the borough must obtain a permit before it could place dredged or fill material on the land. *Id.* at 590.

A Ninth Circuit panel found that the Corps' jurisdictional determination did not constitute final agency action under the Administrative Procedures Act, 5 U.S.C. § 704, holding that it did not meet the second prong of this Court's test set forth in *Bennett*, 520 U.S. 154. While the panel held that the Corps' jurisdictional determination "announces the Corps' considered, definite and firm position about the presence of jurisdictional wetlands on Fairbanks' property," *Fairbanks North Star Borough*, 543 F.3d at 593, it found that it was not an "action . . . by which 'rights or obligations have been determined,' or from which 'legal consequences will flow,'" *id.* (quoting *Bennett*, 520 U.S. at 178). According to the panel, the jurisdictional determination was merely the Corps' "expression of views" of "what the law requires," and Fairbanks would "face liability only for noncompliance with the CWA's underlying statutory commands, not for disagreement with the Corps' jurisdictional determination." *Id.* at 594 (quoting *Ukiah Valley Med. Ctr. v. FTC*, 911 F.2d 261, 264 (9th Cir. 1990) and

AT&T v. EEOC, 270 F.3d 973, 975 (D.C. Cir. 2001)). The panel found that the jurisdictional determination had only "practical" consequences, because regardless of the Corps' view, the parcel was either "waters of the United States" for purposes of the Clean Water Act, or it was not. *See id.* at 595. Therefore, according to the panel, the Corps' opinion did not "alter the physical reality or the legal standards used to assess that reality," and was of no more consequence than "a report by a private wetlands consultant informing Fairbanks that its property contained wetlands." *Id.*

This analysis parses all meaning out of the second *Bennett* prong. The Corps' jurisdictional determination is more than a mere opinion; it is that agency's legal conclusion that it has jurisdiction over a particular parcel of land – a jurisdiction that is not apparent from the terms of the statute, the implementing regulations, or examination of the parcel. And legal consequences for the applicant *do* flow from the Corps' assertion of jurisdiction. The applicant is required to obtain a permit to discharge into "waters of the United States" or face serious civil and criminal penalties. *See* 33 U.S.C. § 1319(b)-(c). In cases such as this, where the land does not clearly contain such waters, the statutory requirement depends on the Corps' interpretation of the Act. The Corps' jurisdictional decision makes the Clean Water Act's statutory commands applicable to the particular parcel, and therefore it effectuates the developer's obligation to follow the Act.

A. For Some Property, the Legal Obligations of the Clean Water Act Depend Upon the Agency's Interpretation of the Statute, as Applied to a Particular Parcel of Land.

For land such as Fairbanks' proposed park, the Clean Water Act's legal obligations take effect only in concert with the agency's interpretation. The Ninth Circuit's concept that the Corps' jurisdictional determination has no legal consequences because it exists independently from the obligations of the Clean Water Act makes no sense in the context of Section 404 permits. At least in wetlands cases such as this, the lands to which the Clean Water Act applies – those containing "waters of the United States" – are often identifiable as such only through the Corps' analysis. For example, the language of the statute does not provide clear guidance when applied to the frozen lands in this case, which are not obviously included in a law intended "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). The magnitude of the Corps' interpretative authority is heightened by the lack of direction from the Court "on precisely how to read Congress' limits on the reach of the Clean Water Act," causing regulated entities to "feel their way on a case-by-case basis." *Rapanos*, 547 U.S. at 758 (Roberts, C.J., concurring).[3] For cases such as

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[3] In addition to the vagueness of the Clean Water Act, courts in the post-*Rapanos* era face the added difficulty of

(Continued on following page)

this, the statutory permitting requirements have a recognizable legal effect only if and when the Corps decides that particular parcels of property contain the vaguely-defined "waters of the United States."

The statutory language is general. It provides that "any addition of any pollutant to navigable waters from any point source" "by any person shall be unlawful." 33 U.S.C. §§ 1311(a), 1362(12). "Pollutant" includes not only traditional contaminants, but also solids such as "dredged spoil, . . . rock, sand, [and] cellar dirt." § 1362(6). "Navigable waters" are defined as "the waters of the United States, including the territorial seas." § 1362(7). While the statutory language clearly prohibits discharging pollutants into navigable lakes, rivers, and the territorial sea, its application to solid land is less obvious and manifestly counterintuitive. *Cf. Rapanos*, 547 U.S. at 734 (plurality opinion) (finding that, as to specific examples of Corps' determinations, "[t]he plain language of the [Clean Water Act] simply does not authorize this 'Land Is Waters' approach to federal jurisdiction.").

The Corps' regulations also fail to offer clear guidance to the question of whether a particular parcel of land falls within the scope of the Clean

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deciding which opinion in that case to follow. *See, e.g., U.S. v. Cundiff*, 555 F.3d 200, 208 (6th Cir. 2009) (discussing difficulty in determining which *Rapanos* opinion relied on the "narrowest grounds," the traditional test for following plurality opinions under *Marks v. U.S.*, 430 U.S. 188 (1977)); and *U.S. v. Robison*, 521 F.3d 1319 (11th Cir. 2008) (same).

Water Act. They interpret the "waters of the United States" to include "mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation or destruction of which could affect interstate or foreign commerce." 33 C.F.R. § 328.3(a)(3).

And whether a parcel contains wetlands is not self-evident. Wetlands are defined as "those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions." 33 C.F.R. § 328.3(b). The Corps' Wetlands Delineation Manual, including over 100 pages of technical guidance for Corps officers, interprets this definition of wetlands to require: (1) prevalence of plant species typically adapted to saturated soil conditions, determined in accordance with the United States Fish and Wildlife Service's National List of Plant Species that Occur in Wetlands; (2) hydric soil, meaning soil that is saturated, flooded, or ponded for sufficient time during the growing season to become anaerobic, or lacking in oxygen, in the upper part; and (3) wetland hydrology, a term generally requiring continuous inundation or saturation to the surface during at least five percent of the growing season in most years. *See Wetlands Research Program Technical Report* Y-87-1 (on-line edition), pp. 12-34 (Jan. 1987), *available at* http://el.erdc.usace.army.mil/elpubs/pdf/wlman87.pdf.

These indefinite guidelines effectively give the Corps authority to decide, on a case-by-case basis, who must follow the Act's requirements. "[T]he definitions [the Corps uses] to make jurisdictional determinations are deliberately left 'vague.'" *Rapanos*, 547 U.S. at 727 (citing U.S. General Accounting Office, *Report to the Chairman, Subcommittee on Energy Policy, Natural Resources and Regulating Affairs, Committee on Government Reform, House of Representatives, Waters and Wetlands: Corps of Engineers Needs to Evaluate Its District Office Practices in Determining Jurisdiction*, GAO-04-297, pp. 20-22 (Feb. 2004)). The regulations "leave room for interpretation by the Corps districts when considering jurisdiction over, for example . . . adjacent wetlands." GAO Report at 2. These ambiguous standards require subjective judgment calls by the Corps about "topographic features, geological and soil characteristics, fauna and flora, and other environmental factors" to determine whether property contains "wetlands" that should be considered "waters of the United States." *See id.* at 26. In general, "Corps' staff conduct jurisdictional determinations by considering a range of factors, and they often view each factor's importance within the context of the actual site of a proposed project." *Id.* at 7. The Corps has acknowledged that, "given the complexity of nature and the need for some degree of flexibility within and among districts,"

"nationwide consistency in making jurisdictional determinations" is "not possible to achieve." *Id.* at 26.[4]

The Corps' subjective judgments and ultimate decision to apply the law to a particular parcel inextricably ties its jurisdictional determination to the legal obligations imposed by the Clean Water Act. In these cases the statutory term "waters of the United States" has no effective meaning or application independent of the Corps' determination. While the underlying legal obligation to acquire permits for discharging into wetlands arises from the statute, the Act itself is so vague as to what constitutes "waters of the United States," that in effect, it does not specify to whom that legal obligation applies. When the statute's applicability is unrecognizable to a landowner without a declaration from the Corps, the statute has legal force only through that declaration. For these lands, the jurisdictional determination is an action by which "obligations [of the landowner] have been determined," and from which "legal consequences will flow." *Bennett*, 520 U.S. at 178.

The Ninth Circuit's proverbial "private wetlands consultant," in contrast, could only make an educated guess about what the Corps would conclude from any particular combination of physical factors; he or she

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[4] Under the Corps' regulations, a final jurisdictional determination issued for a parcel of land has no precedential effect. *See* 33 C.F.R. § 331.7(g). Each jurisdictional determination is left to the Corps' judgment, regardless of its past practices.

would certainly not find a clear answer in the statute or regulations. The Corps' jurisdictional determination and the opinion of the private consultant differ in two other significant ways as well: a court will give deference to the agency's interpretation of whether a parcel contains "waters of the United States," and the Corps enforces the permitting requirement of 33 U.S.C. § 1344(a) for discharges into these waters.

B. A Decision that an Applicant Must Obtain a Permit, Made by the Agency that Enforces the Permit Requirement, Determines the Applicant's Legal Obligations.

The decision by the Corps that a parcel of land contains wetlands is a determination by the enforcement agency that the applicant must obtain permits to develop the land. Because the agency enforces the law according to its own analysis, the Corps' jurisdictional determination does not "simply 'remind[ ]' affected parties of existing duties," as the Ninth Circuit panel found. *Fairbanks North Star Borough*, 543 F.3d at 595 n.10.

Rather, it is an agency decision to which a reviewing court will defer. As discussed above, the Corps' determination of the existence of wetlands requires it to consider a multitude of factors. The Corps must make judgments as to how wet (or iceladen) a parcel's soil must be, and for how long, in deciding whether it should be considered "wetlands."

Agencies given authority under statutes "such as the Clean Water Act are afforded generous leeway by the courts in interpreting the statute they are entrusted to administer." *Rapanos*, 547 U.S. at 758. Because of the individual nature of any given parcel of land, Congress left it to the Corps to determine if the landowner is subject to the Act, and because soil, plant, and water analysis is not within the expertise of courts, they are likely to respect the agency decision. *See, e.g., U.S. v. Deaton*, 332 F.3d 698, 713 (4th Cir. 2003) (deferring to the Corps' interpretation, since it "deals in a complex scientific field, wetlands ecology and hydrology."). This deference gives significant legal weight to the Corps' assertion of jurisdiction.

And the Corps is the agency charged with enforcing the Section 404 permitting requirements. 33 U.S.C. § 1344(a). For this reason alone, the Ninth Circuit is wrong in finding that the Corps' jurisdictional determination has no more legal effect on the applicant's obligation to get a permit than would a report by a private consultant. *See Fairbanks North Star Borough*, 543 F.3d at 595. Nor does the Corps' analysis simply "place[Fairbanks] on notice that construction might require a Section 404 permit," as the Ninth Circuit suggested. *Id.* Instead, the Corps' decision asserts jurisdiction over the land based on its analysis of the "physical realities," thereby altering the legal regime to which the landowner is subject. The Corps demands compliance, as evidenced by its letter informing Fairbanks that, based

on the jurisdictional determination, the borough must acquire Section 404 permits to proceed with its project. *See id.* at 590. The Corps' assertion of jurisdiction becomes part of the permanent record of the parcel, and exposes applicants such as Fairbanks to sanctions if they do not honor it. *See, e.g., Rapanos*, 547 U.S. at 720 ("[F]or backfilling his own wet fields, Mr. Rapanos faced 63 months in prison and hundreds of thousands of dollars in criminal and civil fines.").

The Ninth Circuit panel parsed this point far too finely, finding that "[t]he approved jurisdictional determination did not augment the Corps' legal authority to pursue enforcement action," since "Fairbanks' legal obligations – including the obligation to pursue a Section 404 dredge and fill material discharge permit – have always arisen solely on account of the CWA." *Fairbanks North Star Borough*, 543 F.3d at 596. That reasoning assumes that the scope of lands containing "waters of the United States" necessarily has meaning apart from the Corps' interpretation. This assumption is simply not true for wetlands, which at best fall on the margins of the Clean Water Act. *See U.S. v. Riverside Bayview Homes*, 474 U.S. 121, 131 (1985) (stating that the phrase "water of the United States" in the Clean Water Act refers primarily to "rivers, streams, and other hydrographic features more conventionally identifiable as 'waters'" than the wetlands adjacent to such features). It is even less true for purported wetlands underlain with permafrost, as is much of the land in Alaska. U.S.

Fish and Wildlife Service, *supra*, at 19-20. For these lands, the jurisdictional determination did *more* than "augment the Corps' legal authority to pursue enforcement action," *Fairbanks North Star Borough*, 543 F.3d at 596; the jurisdictional determination itself made the Act enforceable against Fairbanks, which would be subject to criminal, civil, and administrative penalties should it fail to comply. *See* 33 U.S.C. § 1319(b)-(c), (g). It was that decision, not the Clean Water Act alone, that made Fairbanks legally obligated to begin the process during which "[t]he average applicant for an individual permit [spent] 788 days and $271,596 in 2002." *Rapanos*, 547 U.S. at 721 (citing Sunding & Zilberman, *supra*, at 74-86).

II. EVEN IF THE NINTH CIRCUIT WERE CORRECT THAT THE JURISDICTIONAL DETERMINATION IS NOT A FINAL AGENCY ACTION, THE COURT SHOULD FIND IT REVIEWABLE UNDER THE COLLATERAL ORDER DOCTRINE.

The Court should accept and decide this case on the alternative ground that a court may immediately review a jurisdictional determination under the collateral order doctrine. Delaying the right to court review until after the permitting is complete requires the applicant to submit to a process so difficult, expensive, and time-consuming that an after-the-fact court challenge loses its purpose.

This Court adopted the collateral order doctrine in *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S.

541, 546 (1949), describing a "small class" of orders that do not end the proceedings below but that should, for systemic reasons, be treated as final and immediately appealable. While the Court developed the collateral order doctrine to provide relief from overly strict application of the requirement that appellate courts review only final decisions of district courts, *see* 28 U.S.C. § 1291, the Court has suggested that the doctrine should also apply to an order that impacts but does not end an administrative proceeding. *See, e.g., FTC v. Standard Oil Co.*, 449 U.S. 232, 246 (1980) (applying the collateral order doctrine to determine the reviewability of an agency order); *see also Bell v. New Jersey and Pennsylvania*, 461 U.S. 773, 778 (1983) ("*[A]t least in the absence of an appealable collateral order* . . . the federal courts may exercise jurisdiction only over a final order of the Department [of Education]."") (emphasis added; citations omitted).

In *Cohen*, the Court adopted a practical construction of finality, holding that under limited circumstances an order that does not actually end litigation may be reviewed as a "final" order. 337 U.S. at 546. To be immediately appealable, an order must meet three criteria: it must "conclusively determine the disputed question, resolve an important issue completely separate from the merits of the action, and be effectively unreviewable on appeal from a final judgment." *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 468 (1978). These requirements "help qualify for immediate appeal classes of orders in which the

considerations that favor immediate appeals seem comparatively strong and those that disfavor such appeals seem comparatively weak." *Johnson v. Jones*, 515 U.S. 304, 311 (1995).

The Corps' decision to assert jurisdiction over a parcel of land meets these three requirements and therefore should be considered a final order subject to immediate review. First, the order "conclusively determines the disputed question." *See Coopers & Lybrand*, 437 U.S. at 468. The Corps has established a formal procedure for affected parties to solicit its official and final position about the existence and extent of Clean Water Act regulatory jurisdiction over a particular parcel. *See* 33 C.F.R. Part 331. "An approved [jurisdictional determination] is an official Corps determination that jurisdictional [waters under the Clean Water Act] are either present or absent on a particular site." Jurisdictional Determinations, Corps Regulatory Guidance Letter 08-02, at 1 (June 26, 2008), *available at* http://newsletters.wetlandstudies.com/docUpload/RGL08021.pdf. After the district engineer's approved jurisdictional determination has been upheld by the division engineer, no further administrative appeal is possible. *See* 33 C.F.R. § 331.9. In this case, the Ninth Circuit held that "an approved jurisdictional determination upheld in the Corps' administrative appeal process 'mark[s] the consummation of the agency's decision-making process' for determining whether the Corps conceives a property as subject to CWA jurisdiction." *Fairbanks North Star Borough*, 543 F.3d at 591. The

jurisdictional determination the Corps issued in this case "is 'devoid of any suggestion that it might be subject to subsequent revision' or 'further agency consideration or possible modification.'" *Id.* (citing *City of San Diego v. Whitman*, 242 F.3d 1097, 1102 (9th Cir. 2001) and quoting *Ontario v. EPA*, 912 F.2d 1525, 1532 (D.C. Cir. 1990) and *Ciba-Geigy Corp. v. EPA*, 801 F.2d 430, 436-47 (D.C. Cir. 1986)).

The jurisdictional determination also meets the second requirement for application of the collateral order doctrine, because it resolves an important issue that is separate from the merits of the action. *See Coopers & Lybrand*, 437 U.S. at 468. The question of whether the Corps has authority under the Clean Water Act to assert jurisdiction over a parcel of land is both important and entirely separate from the merits of whatever permitting requirements the Corps may impose on the landowner proposing to develop the land.

Finally, the jurisdictional determination is "effectively unreviewable on appeal from a final judgment." *Id.* The use of the word "effectively" recognizes that an order may be technically subject to review at the end of a case, but that the appealing party's interests may not be capable of vindication at that late date. *See, e.g., Mitchell v. Forsyth*, 472 U.S. 511, 526-27 (1985) (discussing the need for immediate review of interlocutory orders refusing to grant qualified immunity); *Abney v. United States*, 431 U.S. 651, 660-62 (1977) (discussing the need for immediate review of interlocutory orders rejecting claims of

double jeopardy). "The requirement that the issue underlying the order be 'effectively unreviewable' later on . . . means that failure to review immediately may well cause significant harm." *Johnson,* 515 U.S. at 311.

In the context of the Corps' jurisdictional determinations, the lack of immediate review subjects the landowner to the authority and the accompanying procedural demands of a federal agency. Before the applicant can contest the Corps' assertion of jurisdiction, it must first slog through a permitting process that on average takes over two years, but can take much longer, *see* Sunding & Zilberman, *supra*, at 75-76, and that requires patience, diplomacy, and a deep pocket to complete. Even preparing the application is arduous; for example, the Section 404 permit application of the City of Chicago for an airport project was "a four-volume document that [was] hundreds of pages long." *National Mitigation Banking Ass'n v. U.S. Corps of Engineers,* 2007 WL 495245 at *3 (N.D. Ill. 2007).

After the application is prepared, federal and state regulatory agencies must certify, approve, or at least agree not to contest, the Section 404 permit. *See, e.g.,* 33 U.S.C. § 1344(c) (giving U.S. Environmental Protection Agency veto power); 33 U.S.C. § 1344(m) (granting U.S. Fish & Wildlife Service comment right); 33 U.S.C. § 1341 (requiring state agency certification). When combined with concurrent

permitting under a host of other federal, state, and local laws,[5] multi-pronged discussions often lead to conditions imposed on the applicant through the Section 404 permit. 33 C.F.R. § 325.4 (codifying Corps' authority to impose conditions). Permit applicants – particularly public applicants – must make public commitments to agencies and citizen groups concerning mitigation measures, must seek approvals from agencies and sometimes from local legislative bodies, and must pay for studies, designs, and mitigation.

The mitigation requirement alone can be complex and time-intensive. The compensatory mitigation review, which is embedded within the Section 404 permitting regime, makes "[p]ermit applicants . . . responsible for proposing an appropriate compensatory mitigation option to offset unavoidable impacts."

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[5] The wetlands development process often begins years before any design is honed to the point that a formal application for a wetlands permit can be filed. Through the National Environmental Policy Act, the public, agencies, and governments, including the Corps of Engineers, review the lands the Corps claims as jurisdictional, study practicable alternatives, and work out mitigation measures. The impacts of placing fill can require analysis, approval, and commitments to mitigate under the Coastal Zone Management Act, Clean Air Act, Marine Mammal Protection Act, Endangered Species Act, Migratory Bird Treaty Act and others, with each federal, state, and local act adding its own layer of procedures and approvals. *See, e.g.*, list appended to Alaska Interagency Consultation and Coordination Agreement for FHWA/DOT&PF Transportation Projects, *available at* http://www.dot.state.ak.us/stwddes/dcsenviron/assets/pdf/resources/akicca.pdf (showing agreement among nine agencies concerning permit coordination).

33 C.F.R. § 332.3(a)(1). The Corps will agree to specific mitigation only when the district engineer deems it sufficient to compensate for unavoidable impacts to "waters of the United States." *Id.* Many variables are considered in determining the appropriate type, quantity and quality of mitigation. For example, the Corps would not grant Alaska a Section 404 permit for an airport project unless the airport compensated for the loss of wetlands by agreeing to preserve and rehabilitate an undeveloped portion of an entirely separate bog located four miles away. *See* Brief of Appellee-Intervenor at 20, *Alaska Center for the Environment v. Secretary, U.S. Dept. of the Army*, No. 03-35074, 2003 WL 22724132 (9th Cir. May 10, 2003). The airport commissioned studies of this bog's hydrology and the feasibility of rehydration, and conducted another study to see whether the rehabilitation would pose a hazard to aviation. *Id.* at 20-21. The Corps then analyzed the functions and values of both the airport bogs and the mitigation bog to assure an appropriate level of compensation. *Id.* at 21-22. Three airport bog areas were divided into micro-environments for analysis; one was divided into 123 separate polygons representing micro-environments as small as .1 acre, so that the agencies could compare the biologic functions of the flarks (small depressions), associated stangs (small ridges), and vegetative communities among the bogs. *Id.* at 22. The airport was required to conduct this field work to study and compare each micro-environment within the proposed fill area with the area proposed for compensatory mitigation, in

order to come to agreement with the Corps on the conditions for a Section 404 permit. *Id.*

This is only a moderate example of the work that mitigation can require; it can also require that the landowner trade or purchase other lands as compensation. *See, e.g., Floridian Clean Water Network, Inc. v. Grosskruger*, 587 F.Supp.2d 1236, 1239 (M.D. Fla. 2008) (discussing Corps' requirement that an airport authority arrange to have approximately 10,000 acres of adjacent land put under conservation easements in order to fill 1,530 acres of land); *National Mitigation Banking Ass'n*, 2007 WL 495245 at *1 (discussing Corps' requirement that, as a condition to a Section 404 permit to fill 97.1 acres of wetlands, the City of Chicago pay approximately $4.5 million to a mitigation bank provider in exchange for 62 acres of mitigation credits and pay $26 million to an in-lieu fee provider that agreed to undertake an additional 280 credits of mitigation); *Sierra Club v. U.S. Army Corps of Engineers*, 450 F.Supp.2d 503, 513 (D.N.J. 2006) (discussing the condition on a Section 404 permit to fill 7.69 acres of wetlands that developer enhance 15.38 acres of wetlands offsite and preserve a tract "containing hundreds of acres of wetlands, by means of causing a conveyance in fee to [a conservation trust]."), *vacated*, 277 Fed.Appx. 170 (3rd Cir. 2008).

Having made the public commitments, obtained the approvals and votes, and expended the funds, the permit applicant has already suffered the consequences of the Corps' jurisdictional determination. Even if the applicant believes deeply that the

jurisdictional determination was improper, challenging the agency's underlying legal authority cannot vindicate the applicant's interests once it has spent the time, money and political capital to get through the permitting process. The Corps has already flexed its regulatory muscle – possibly without authority – and the landowner's bundle of property interest sticks has been compromised. By that point, the jurisdictional determination has become "effectively unreviewable."

In order to prevent this result, the collateral order doctrine should apply to allow immediate court review of a jurisdictional determination by the Corps.

CONCLUSION

For the foregoing reasons, the Court should grant the petition.

Respectfully submitted,

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